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No. 76-869

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALBERT DEFALCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A3) is reported at 546 F. 2d 419.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1976. A petition for rehearing was denied on November 16, 1976. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to December 24, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied effective assistance of counsel on appeal.

2. Whether the district court erred in refusing to give an "uncalled witness" instruction to the jury.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to defraud the Immigration and Naturalization Service by falsely representing himself as a secretary and administrative assistant to Congressman Henry Helstoski (Count I) and demanding and receiving payments from aliens illegally residing in this country to introduce private bills in the House of Representatives that would grant them permanent residence, in violation of 18 U.S.C. 912, 371, and 2 (Counts II, III, and XIV). Petitioner was sentenced to consecutive terms of three years' imprisonment on Counts II and III; to three years' imprisonment on Count XIV, to be served concurrently with the sentence on Count II; and to five years' imprisonment on Count I, to be served concurrently with the sentences on Counts II and III.[1] The court of appeals affirmed without opinion (Pet. App. A1-A3).

After the court of appeals affirmed his conviction, petitioner retained new counsel and moved to stay the judgment of the court of appeals on the ground that petitioner had been denied effective assistance of counsel on appeal. In an affidavit attached to his motion (Pet. App. A8-A10), petitioner stated that during the appeal, his attorney, Vincent Verdiramo, entered a plea of guilty to charges arising from the same activities for which petitioner had been convicted. He further stated that although he knew of

[1]Counts IV-VII and IX-XIII were dismissed at the close of the government's case. The district court subsequently granted a motion for judgment of acquittal as to Count VIII. Petitioner's co-defendants pleaded guilty prior to trial.

Verdiramo's indictment when he retained him, Verdiramo protested his innocence. Petitioner also claimed that Verdiramo had failed adequately to present issues in the brief on appeal. In response to the motion, the court of appeals stayed issuance of its judgment until November 7, 1976, "without prejudice to the right of [petitioner] to proceed under 28 U.S.C. 2255, where a record may be made in the district court, or to file a petition for rehearing en banc as to issues presented on this appeal." (Pet. App. A4). Petitioner filed a petition for rehearing setting forth the basis for his claim that he had been denied effective assistance of counsel. On November 16, 1976, the court of appeals denied the petition.

ARGUMENT

1. Petitioner contends (Pet. 24-29) that the court of appeals erred in deferring consideration of his claim that he was denied effective assistance of counsel by ruling that he could proceed under 28 U.S.C. 2255 in the district court, where an evidentiary record could be developed. Petitioner overlooks the fact that the court of appeals also permitted him to file a petition for rehearing on his claim, which he did. Under these circumstances, petitioner was not denied consideration of his contention. Indeed, in similar circumstances, this Court has afforded the same procedural relief. For example, in *Suchy* v. *United States*, 423 U.S. 1042, where a serious question of denial of assistance of counsel on appeal was presented in a petition for a writ of certiorari, this Court remanded to the court of appeals so that the petitioner could seek rehearing and the court could determine whether further briefing and argument were necessary. Here, petitioner was given the same opportunity.

Petitioner now suggests Verdiramo was caught in a conflict of interest because he was negotiating with the

government on his own behalf while representing petitioner on appeal (Pet. 24). In the first place, Verdiramo was not indicted until after submission of his brief on behalf of petitioner.[2] Since the court of appeals did not hold oral argument on the appeal, Verdiramo's representation of petitioner on appeal was complete before he was indicted. Second, petitioner's petition for rehearing filed in the court of appeals did not explain how, if at all, Verdiramo's alleged conflict abridged petitioner's right to counsel, other than to allege that "the issues arising from [petitioner's] conviction have not been presented on this appeal" (Pet. for Reh. 4).[3] The court of appeals' denial of the petition for rehearing does not warrant review by this Court, especially in light of petitioner's opportunity—expressly preserved to him by the court of appeals—to develop a full record supporting his claim at a Section 2255 hearing.

2. Petitioner also contends (Pet. 29-37) that he was entitled to an "uncalled witness" instruction because the government failed to call Ronald Blackwell, who allegedly received the cash paid by the aliens for petitioner's promises and whose testimony petitioner asserts would have been

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[2]Petitioner was convicted on December 8, 1975. On January 7, 1976, he retained Verdiramo, who filed an appellate brief on May 3, 1976. Verdiramo was indicted on June 2, 1976. On September 28, 1976, Verdiramo pleaded guilty to conspiracy to obstruct justice and to the substantive crime of obstruction of justice. On October 6, 1976, petitioner's conviction was affirmed.

[3]The affidavit for rehearing executed by petitioner's present counsel stated only that the issue on rehearing was "whether [petitioner] was denied the right of counsel * * * in that the attorney for petitioner, while presecuting [sic] this appeal, had committed actions of a criminal and disbarable nature leading to his plea of guilty in the course of his alleged representation of petitioner" (Aff. of Pet. for Reh. 2).

favorable to him. Petitioner did not raise this issue in his brief on appeal, nor did he contend in his petition for rehearing that it was an issue that should have been raised.[4] He is therefore precluded from raising it now. *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2.

In any event, the claim lacks merit. This Court has stated that a missing witness instruction is appropriate only where one party has it peculiarly within its power to call the witness. *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208, 226; *Graves* v. *United States*, 150 U.S. 118, 121; *United States* v. *Restaino*, 369 F. 2d 544 (C.A. 3). In this case, Blackwell could as easily have been called by the defense as by the prosecution, and he could not be considered unavailable to the defense simply because he was awaiting sentence on another conviction and thus might have incentive to testify favorably to the prosecution. This is particularly so in light of the fact that petitioner would have been equally free to attempt to impeach adverse testimony by Blackwell if he called the witness himself as he would if Blackwell had been a prosecution witness. See Fed. R. Evid. 607.

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[4]In an affidavit appended to the petition for rehearing, petitioner's new counsel stated his belief that Verdiramo should have contended on appeal (1) that petitioner could not have been indicted for simultaneously deceiving the aliens *and* the government; (2) that a new trial was necessary because testimony of witnesses with respect to a count on which he was acquitted affected the outcome of the trial; and (3) that the indictment with respect to 18 U.S.C. 912 was defective because it failed to contain the phrase "intent to defraud." However, the appellate brief shows that each of these contentions was raised by Verdiramo (App. Br. 1-8, 9-12, 24-28) with the possible exception of the second contention, which was raised in relation to a claim that there was insufficient evidence to support the conviction.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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